

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

PATTI ANN HURT,

Plaintiff

v.

KILOLO KIJAKAZI,  
Acting Commissioner of Social  
Security Administration,

Defendant

Case No.: 3:20-cv-00481-CSD

**Order**

Re: ECF Nos. 17, 18

Before the court is Plaintiff's Motion for Reversal and Remand. (ECF No. 17.) The Acting Commissioner filed a Cross-Motion to Affirm and response to Plaintiff's motion. (ECF Nos. 18, 19.) Plaintiff filed a reply in support of her motion. (ECF No. 20.)

For the reasons set forth below, Plaintiff's motion is granted; the Acting Commissioner's cross-motion is denied; and this matter will be remanded for further administrative proceedings.

**I. BACKGROUND**

In March of 2017, Plaintiff completed an application for disability insurance benefits (DIB) under Title II of the Social Security Act, alleging disability beginning on December 9, 2011. (Administrative Record (AR) 207-208.) She later amended her alleged onset date to January 1, 2013. (AR 40.) The applications were denied initially and on reconsideration. (AR 116-120, 124-130.)

Plaintiff requested a hearing before an administrative law judge (ALJ). (AR 132-133.) ALJ William Kurlander held a hearing on November 30, 2019. (AR 33-90.) Plaintiff, who was represented by counsel, appeared and testified on her own behalf at the hearing. Testimony was

1 also taken from a vocational expert (VE). On December 13, 2019, the ALJ issued a decision  
2 finding Plaintiff not disabled. (AR 15-27.) Plaintiff requested review, and the Appeals Council  
3 denied the request, making the ALJ's decision the final decision of the Acting Commissioner.  
4 (AR 1-3.)

5 Plaintiff then commenced this action for judicial review under 42 U.S.C. § 405(g).  
6 Plaintiff argues: (1) the ALJ failed to provide clear and convincing reasons for finding her  
7 subjective statements were inconsistent with the evidence in the record; and (2) the residual  
8 functional capacity (RFC) assessment is not supported by substantial evidence because the ALJ  
9 rejected all medical opinions in the record and crafted limitations that lacked a proper medical  
10 foundation.

11 The Acting Commissioner, on the other hand, argues that the ALJ properly discounted  
12 Plaintiff's subjective symptom testimony, and the RFC did not lack proper medical foundation.

## 13 **II. LEGAL STANDARD**

### 14 **A. Five-Step Evaluation of Disability**

15 Under the Social Security Act, "disability" is the inability to engage "in any substantial  
16 gainful activity by reason of any medically determinable physical or mental impairment which  
17 can be expected to result in death or which has lasted or can be expected to last for a continuous  
18 period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(A). A claimant is disabled if his or  
19 her physical or mental impairment(s) is/are so severe as to preclude the claimant from doing not  
20 only his or her previous work but also any other work which exists in the national economy,  
21 considering his or her age, education and work experience. 42 U.S.C. § 1382c(a)(3)(B).

22 The Commissioner has established a five-step sequential process for determining whether  
23 a person is disabled. 20 C.F.R. §404.1520 and § 416.920; *see also Bowen v. Yuckert*, 482 U.S.

1 137, 140-41 (1987). In the first step, the Commissioner determines whether the claimant is  
2 engaged in "substantial gainful activity"; if so, a finding of nondisability is made and the claim is  
3 denied. 20 C.F.R. § 404.152(a)(4)(i), (b); § 416.920(a)(4)(i); *Yuckert*, 482 U.S. at 140. If the  
4 claimant is not engaged in substantial gainful activity, the Commissioner proceeds to step two.

5       The second step requires the Commissioner to determine whether the claimant's  
6 impairment or combination of impairments are "severe." 20 C.F.R. § 404.1520(a)(4)(ii), (c) and  
7 § 416.920(a)(4)(ii), (c); *Yuckert*, 482 U.S. at 140-41. An impairment is severe if it significantly  
8 limits the claimant's physical or mental ability to do basic work activities. *Id.* If the claimant has  
9 an impairment(s) that is severe, the Commissioner proceeds to step three.

10       In the third step, the Commissioner looks at a number of specific impairments listed in  
11 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listed Impairments) and determines whether the  
12 claimant's impairment(s) meets or is the equivalent of one of the Listed Impairments. 20 C.F.R.  
13 § 404.1520(a)(4)(iii), (d) and § 416.920(a)(4)(iii), (d). The Commissioner presumes the Listed  
14 Impairments are severe enough to preclude any gainful activity, regardless of age, education or  
15 work experience. 20 C.F.R. § 404.1525(a), § 416.925(a). If the claimant's impairment meets or  
16 equals one of the Listed Impairments, and is of sufficient duration, the claimant is conclusively  
17 presumed disabled. 20 C.F.R. § 404.1520(a)(4)(iii), (d), § 416.920(a)(4)(iii), (d). If the claimant's  
18 impairment is severe, but does not meet or equal one of the Listed Impairments, the  
19 Commissioner proceeds to step four. *Yuckert*, 482 U.S. at 141.

20       At step four, the Commissioner determines whether the claimant can still perform "past  
21 relevant work." 20 C.F.R. § 404.1520(a)(4)(iv), (e), (f) and § 416.920(a)(4)(iv), (e), (f). Past  
22 relevant work is that which a claimant performed in the last 15 years, which lasted long enough  
23

1 for him or her to learn to do it, and was substantial gainful activity. 20 C.F.R. § 404.1565(a) and  
2 § 416.920(a).

3 In making this determination, the Commissioner assesses the claimant's residual  
4 functional capacity and the physical and mental demands of the work previously performed. *See*  
5 *id.*; 20 C.F.R. § 404.1520(a)(4)(v), § 416.920(a)(4)(v); *see also Berry v. Astrue*, 622 F.3d 1228,  
6 1231 (9th Cir. 2010). RFC is what the claimant can still do despite his or her limitations.  
7 20 C.F.R. § 404.1545 and § 416.945. In determining the RFC, the Commissioner must assess all  
8 evidence, including the claimant's and others' descriptions of the limitations, and medical reports,  
9 to determine what capacity the claimant has for work despite his or her impairments.  
10 20 C.F.R. § 404.1545(a)(3) and 416.945(a)(3).

11 A claimant can return to previous work if he or she can perform the work as he or she  
12 actually performed it, *i.e.*, if he or she can perform the "actual functional demands and job duties  
13 of a particular past relevant job," or as generally performed, *i.e.*, "[t]he functional demands and  
14 job duties of the [past] occupation as generally required by employers throughout the national  
15 economy." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (internal quotation marks and  
16 citation omitted). If the claimant can still do past relevant work, then he or she is not disabled.  
17 20 C.F.R. § 404.1520(f) and § 416.920(f); *see also Berry*, 62 F.3d at 131.

18 If, however, the claimant cannot perform past relevant work, the burden shifts to the  
19 Commissioner to establish at step five that the claimant can perform other work available in the  
20 national economy. 20 C.F.R. §§ 404.1520(e), 416.920(e); *see also Yuckert*, 482 U.S. at 141-42,  
21 144. This means "work which exists in significant numbers either in the region where such  
22 individual lives or in several regions of the country." *Gutierrez v. Comm'r of Soc. Sec. Admin.*,  
23 740 F.3d 519, 528 (9th Cir. 2014). The Commissioner must also consider the claimant's RFC,

age, education, and past work experience to determine whether the claimant can do other work. *Yuckert*, 482 U.S. at 141-42. The Commissioner may meet this burden either through the testimony of a VE or by reference to the Grids.<sup>1</sup> *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999).

If the Commissioner establishes at step five that the claimant can do other work which exists in the national economy, then he or she is not disabled. 20 C.F.R. § 404.1566(b), § 416.966(b). Conversely, if the Commissioner determines the claimant is unable to adjust to any other work, the claimant will be found disabled. 20 C.F.R. § 404.1520(g), § 416.920(g); *see also* *Lockwood v. Comm'r Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010); *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009).

#### **B. Judicial Review & Substantial Evidence**

The court must affirm the ALJ's determination if it is based on proper legal standards and the findings are supported by substantial evidence in the record. *Gutierrez*, 740 F.3d at 522 (citing 42 U.S.C. § 405(g)). "Substantial evidence is 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 523-24 (quoting *Hill v. Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).

To determine whether substantial evidence exists, the court must look at the record as a whole, considering both evidence that supports and undermines the ALJ's decision. *Gutierrez*, 740 F.3d at 524 (citing *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The court "may

---

<sup>1</sup> "[The grids are matrices of the four factors identified by Congress—physical ability, age, education, and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010) (internal quotation marks and citation omitted).

not affirm simply by isolating a specific quantum of supporting evidence." *Garrison v. Colvin*, 759 F.3d 995, 1009 (9th Cir. 2014) (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007)). "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities." *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). "If the evidence can reasonably support either affirming or reversing, 'the reviewing court may not substitute its judgment' for that of the Commissioner." *Gutierrez*, 740 F.3d at 524 (quoting *Reddick v. Chater*, 157 F.3d 715, 720-21 (9th Cir. 1996)). That being said, "a decision supported by substantial evidence will still be set aside if the ALJ did not apply proper legal standards." *Id.* (citing *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). In addition, the court will "review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely." *Garrison*, 759 F.3d at 1010 (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

### III. DISCUSSION

#### A. ALJ's Findings in this Case

At step one, the ALJ found Plaintiff met the insured status requirements through December 31, 2014, and had not engaged in substantial gainful activity from the amended alleged onset date of January 1, 2013, through her date last insured. (AR 17.)

At step two, the ALJ concluded Plaintiff had the following severe impairments: carpal tunnel syndrome, cervical spine disorder, and obstructive sleep apnea. (AR 17.)

At step three, the ALJ determined Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the Listed Impairments. (AR 18.)

At step four, the ALJ assessed Plaintiff as having the RFC to perform light work, except that she would be off task five percent of the time because of reported pain and fatigue; she could occasionally reach overhead; she could occasionally engage in postural activity, but she could not climb ladders, ropes and scaffolds, or crawl; she could occasionally use ramps and stairs; she could engage in no more than frequent fingering; she could not work at exposed heights; and she could work around moving machinery no more than frequently. (AR 18.)

The ALJ then concluded Plaintiff was able to perform her past relevant work as a General Office Clerk (Dictionary of Occupational Titles (DOT) 219.362-010) and Receptionist (DOT 237.367-038). (AR 25.)

At step five, the ALJ determined, in the alternative, that considering Plaintiff's age, education, work experience and RFC, there were jobs that exist in significant numbers in the national economy that Plaintiff could perform, including: Marker (DOT 209.587-034), Router (DOT 222.587-038) and Office Helper (DOT 239.567-010). (AR 26-27.) As a result, the ALJ found Plaintiff not disabled at any time from her amended alleged onset date of January 1, 2013, through the date last insured of December 31, 2014. (AR 27.)

## **B. Subjective Symptom Testimony**

### **1. Standard for Evaluating Subjective Symptom Testimony**

Evaluating a claimant's subjective symptom testimony "becomes important at the stage where the ALJ is assessing residual functional capacity, because the claimant's subjective statements may tell of greater limitations than can medical evidence alone." *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001) (citing Social Security Ruling (SSR) 96-7P)).<sup>2</sup>

---

<sup>2</sup> SSA previously referred to this as a credibility determination. SSR 96-7P. SSA subsequently eliminated use of the term "credibility." SSA has clarified that "subjective symptom evaluation is

1 “Such testimony is inherently subjective and difficult to measure.” *Coleman v. Saul*, 979  
 2 F.3d 751, 755-56 (9th Cir. 2020). This evaluation is often crucial to a finding of disability. *Id.*  
 3 (citing *Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989)).

4 There is a two-step test for evaluating a claimant’s subjective symptom testimony:

5 First, the ALJ must determine whether the claimant has presented objective  
 6 medical evidence of an underlying impairment which could reasonably be  
 7 expected to produce the pain or other symptoms alleged. In this analysis, the  
 8 claimant is *not* required to show that her impairment could reasonably be  
 9 expected to cause the severity of the symptom she has alleged; she need only  
 10 show that it could reasonably have caused some degree of the symptom. Nor must  
 11 a claimant produce objective medical evidence of the pain or fatigue itself, or the  
 12 severity thereof.

13 If the claimant satisfies the first step of this analysis, and there is no evidence of  
 14 malingering, the ALJ can reject the claimant’s testimony about the severity of her  
 15 symptoms only by offering specific, clear and convincing reasons for doing so.  
 16 This is not an easy requirement to meet: The clear and convincing standard is the  
 17 most demanding required in Social Security cases.

18 *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014) (internal quotation marks and  
 19 citations omitted, emphasis original).

20 An ALJ may consider various factors in evaluating the allegedly disabling subjective  
 21 symptoms, including: daily activities; the location, duration, frequency, and intensity of pain or  
 22 other symptoms; precipitating and aggravating factors; the type, dosage, effectiveness, and side  
 23 effects of any medication taken to alleviate symptoms; treatment, other than medication, received  
 for relief of symptoms; any measures a claimant has used to relieve symptoms; and other factors  
 concerning functional limitations and restrictions due to pain or other symptoms. 20 C.F.R. §  
 404.1529(c), § 416.929(c); SSR 16-3P. The ALJ may also consider an “unexplained or  
 inadequately explained failure to seek treatment or to follow a prescribed course of treatment.”

---

not an examination of an individual’s character.” Instead, the adjudicator considers all of the  
 evidence in evaluating the intensity and persistence of a claimant’s symptoms. SSR 16-3P.



1 *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quotation marks and citation omitted).  
2 The ALJ may further consider conduct by the claimant that is inconsistent with the claimant's  
3 subjective complaints. *Coleman*, 979 F.3d at 756.

## 4 **2. Plaintiff's Testimony**

5 Plaintiff testified that she had neck surgery in 2011. Her prior work included running a  
6 reception desk where she answered phones, received and delivered faxes, and sorted mail. She  
7 did a lot of sitting and some walking. When the company was sold, she transitioned to another  
8 job in their durable medical equipment field where she would put together lightweight walkers,  
9 and was certified in putting on medical compression stockings. She would also run the cash  
10 register, take credit cards, and do inventory. She stopped working there because of her spinal  
11 issues as she could no longer carry things, and she was numb from the waist up, including in her  
12 hands.

13 She takes ibuprofen and acetaminophen for her pain, but she does not like taking narcotic  
14 medication after using it following her neck surgery. She does not use a cane or back brace. She  
15 used wrist braces in the past, but stopped using them because they did not help. She bought a  
16 walker from a thrift store when she had two broken ankles, but did not use it any longer. She has  
17 trouble gripping things due to the numbness in her hands and felt she would not be able to grip a  
18 cane well to use it. She did physical therapy exercises for her hands that helped initially, but then  
19 she got headaches.

20 She can sit for 10 to 15 minutes. She can stand for a 15 minutes. Walking causes her a lot  
21 of pain. She has trouble sleeping, and difficulty lifting things. She is able to make her own lunch  
22 every day, albeit slowly. Her body hurts all over, and she feels like "Gumby."  
23

1 If she were to go back to her past work, it would be difficult to engage in side-to-side  
2 movement, to lift 50 pounds or more, to scan in product, and to stand in the warehouses.

### 3 **3. Analysis**

4 The ALJ found that the claimant's medically determinable impairments could reasonably  
5 be expected to cause the alleged symptoms, but determined Plaintiff's statements concerning the  
6 intensity, persistence and limiting effect of the symptoms were not entirely consistent with the  
7 medical evidence and other evidence in the record. (AR 20.) Therefore, the court must determine  
8 whether the ALJ set forth specific, clear and convincing reasons for rejecting Plaintiff's  
9 testimony about the severity of her symptoms.

#### 10 **a. Objective Medical Evidence**

11 First, the ALJ concluded that Plaintiff's subjective symptom testimony was inconsistent  
12 with the objective medical evidence and other evidence in the record and did not support the  
13 level of symptomology Plaintiff alleged. (AR 20.)

14 An ALJ "may not discredit the claimant's subjective complaints *solely* because the  
15 objective evidence fails to fully corroborate the degree of pain alleged." *Coleman*, 979 F.3d at  
16 756 (emphasis added, citing *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)); *see also*  
17 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2011).

18 The ALJ does not state what specifically is inconsistent between Plaintiff's subjective  
19 symptom statements and the objective medical evidence. "'We cannot review whether the ALJ  
20 provided specific, clear, and convincing reasons for rejecting [the claimant's] pain testimony  
21 where, as here, the ALJ never identified *which* testimony she found not credible, and never  
22 explained *which* evidence contradicted that testimony.'" *Lambert v. Saul*, 980 F.3d 1266, 1277  
23 (9th Cir. 2020) (emphasis original, quoting *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir.

2015)). “Our cases do not require ALJs to perform a line-by-line exegesis of the claimant’s testimony, nor do they require ALJs to draft dissertations when denying benefits.” *Id.* (citation omitted). “But our precedents plainly required the ALJ to do more than was done here, which consisted of offering non-specific conclusions that [the claimant’s] testimony was inconsistent with her medical treatment.” *Id.* (citing *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (explaining that we may not ‘take a general finding—an unspecified conflict between [c]laimant’s testimony ... and her reports to doctors—and comb the administrative record to find specific conflicts”); *Brown-Hunter*, 806 F.3d at 493-94; *Vasquez v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2009)). Moreover, “providing a summary of medical evidence ... is not the same as providing clear and convincing *reasons* for finding the claimant’s symptom testimony not credible.” *Id.* (quoting *Brown-Hunter*, 806 F.3d at 494).

That is exactly what occurred here. The ALJ stated that the alleged intensity, persistence and limiting effects of Plaintiff’s symptoms were inconsistent with the objective medical evidence, and then simply summarized portions of the medical record and concluded again that the objective medical evidence did not support the level of symptomology alleged by Plaintiff. (AR 20.)

A review of the objective medical evidence reveals that the ALJ “cherry picked” a few normal examination findings while ignoring the overall diagnostic picture, which is largely consistent with Plaintiff’s symptom testimony.<sup>3</sup> The record demonstrates that while Plaintiff had

---

<sup>3</sup> This case is admittedly complicated by the fact that the focus of this action is whether Plaintiff was disabled during her period of insurability: from her amended alleged onset date of January 1, 2013, to her date last insured of December 31, 2014. The ALJ’s analysis refers to medical evidence which pre-dates and post-dates her date last insured. That evidence might not be specifically relevant to whether she was in fact disabled during the insurable period, but it is relevant to the ALJ’s assessment of Plaintiff’s credibility. In this case, it also corroborates her

1 some initial improvement in her pain following her December 9, 2011, cervical discectomy and  
2 fusion with Dr. James Olson, her condition subsequently deteriorated. She continued to have  
3 pain, atrophy as well as numbness, decreased and painful range of motion in the cervical and  
4 lumbar spine, and decreased sensation to light touch in the upper and lower extremities. She was  
5 prescribed narcotic pain medication for a long period of time, and her surgeon believed she  
6 would need long term pain management. She had pain over the cervical facets, and tenderness  
7 throughout the spine with radiating pain into the paraspinous musculature. She had 3-4/5 strength  
8 bilaterally. She tried physical therapy, a TENS unit, and other medications, with no success.

9       In February of 2015, it was noted that it was difficult to assess the claimant's true  
10 weakness because she was able to ambulate and get onto the exam table and up and down from a  
11 chair, but she did appear to have significant pain with walking and appeared very uncomfortable.  
12 While an initial EMG nerve study done prior to her surgery was normal, a subsequent study  
13 revealed bilateral carpal tunnel syndrome with bilateral medial neuropathies in her wrists and  
14 chronic C7 radiculopathy in the left upper limb. In June of 2015, Dr. Olson said she could  
15 consider a carpal tunnel release, but he believed this would not solve what he believed was a  
16 chronic global pain syndrome. (AR 363, 368, 419-22, 426-428, 450-52, 541.)

17       The ALJ focused on an examination in March of 2018, with Megan King, APRN, at  
18 Sweetwater Pain and Spine. The ALJ acknowledged that Plaintiff had severely limited cervical  
19 and lumbar flexion and extension, but pointed to findings that Plaintiff had no gross axial  
20 skeletal deformities; a negative Lumbar Quadrant test bilaterally; full and pain free joint range of  
21 motion without obvious instability or laxity; no radiating pain with lumbar extension; negative  
22

23 \_\_\_\_\_  
claim of a deterioration in her condition following her cervical spine surgery in December of  
2011.

1 FABER tests; and an inspection and palpation of the spine and upper and lower extremities was  
2 unremarkable. (AR 20.) The ALJ did not mention the examination findings that are consistent  
3 with her asserted symptomology: Plaintiff had positive Tinel's sign in the hands; an antalgic gait;  
4 4/5 strength in the upper and lower extremities bilaterally; and decreased light touch sensation in  
5 the upper extremities. (AR 544-545.)

6 In sum, the ALJ's finding that Plaintiff's subjective symptoms were inconsistent with the  
7 objective medical evidence is not supported by substantial evidence. Therefore, this is not a clear  
8 and convincing reason to reject Plaintiff's subjective symptom testimony.

9 **b. Walker & Cane**

10 Second, the ALJ said Plaintiff testified that she had a walker at home that she had used a  
11 year prior, and that she should use a cane, but does not; however, the medical record showed  
12 little to no support for a prescription for an assistive device. Thus, the ALJ rejected the assertion  
13 that an assistive device was required for ambulation. (AR 20-21.)

14 Plaintiff is correct that she did not testify that an assistive device was required for  
15 ambulation. She testified that she recently had purchased a walker at a thrift store after she  
16 suffered an injury to both of her ankles. She did not testify that she bought or tried to use the  
17 walker for her spinal issues. The ALJ is correct that there is no prescription for an assistive  
18 device in the record; however, Plaintiff did not testify that anyone had prescribed an assistive  
19 device or that a cane was *required*. Instead, she said *she thought* she should probably use a cane,  
20 but she felt she would have difficulty gripping it. While there is no prescription for an assistive  
21 device, a record from February 10, 2015 (less than two months after the date last insured), noted  
22 that Plaintiff appeared in significant pain with walking, and it was difficult to assess her ability to  
23

1 toe walk, heel walk and repetitively raise her toes due to loss of balance and significant pain.  
2 (AR 456.)

3 The court finds that this is not a clear and convincing reason for rejecting Plaintiff's  
4 testimony.

5 **c. ALJ's Personal Observations**

6 Third, the ALJ said that Plaintiff's subjective symptom statements were inconsistent with  
7 the ALJ's personal observations of the claimant. Plaintiff testified that she could not feel/had  
8 numbness in her hands, but the ALJ pointed out that she was able to pick up a pen and sign her  
9 name at the hearing.

10 "The ALJ's observations of a claimant's functioning may not form the sole basis for  
11 discrediting a person's testimony." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing SSR  
12 96-7p at 8). "Instead, an ALJ's personal observations may be used only in 'the overall evaluation  
13 of the credibility of the individual's statements.'" *Id.*

14 In *Trevizo v. Berryhill*, 871 F.3d 664 (9th Cir. 2017), the ALJ discredited the claimant's  
15 testimony that she had a weak grip and numbness in her fingers because an examining  
16 psychologist had noted that the claimant had a normal pencil grip during the examination.  
17 *Trevizo*, 871 F.3d at 680. The Ninth Circuit said that this "signals only that [the claimant] held a  
18 pencil in a normal manner and not that there were no limitations to her gripping strength or fine  
19 or gross manipulation abilities, which [the psychologist] would have been in no position to  
20 assess." *Id.* The court concluded there was "no basis, much less a 'clear and convincing one,' for  
21 crediting the opinion of an examining psychologist with respect to [the claimant's] grip over that  
22 of [the] primary treating physician and [the claimant's] own testimony." *Id.*

1 Here, the ALJ's observation that Plaintiff could pick up a pen for the few seconds  
2 required to affix her signature to a piece of paper does not translate to a conclusion that she did  
3 not experience numbness or overall difficulty gripping things. The ALJ acknowledged that  
4 Plaintiff's EMG showed she had bilateral median neuropathies of both wrists as well as  
5 superimposed chronic C7 radiculopathy in the left upper limb. (AR 541.) Moreover, Plaintiff  
6 consistently complained of bilateral upper extremity radiculopathy symptoms and paresthesia in  
7 her upper extremities and fingers. (AR 465, 473, 494, 505.)

8 Therefore, the court does not find this is a clear and convincing reason for rejecting  
9 Plaintiff's testimony about her numbness and gripping ability.

#### 10 **d. Prescribed Treatment**

11 Finally, the ALJ concluded that Plaintiff's failure to follow prescribed treatment that  
12 might improve her symptoms is inconsistent with her subjective symptom statements. The ALJ  
13 said that on March 13, 2012, the orthopedic provider recommended that Plaintiff attend physical  
14 therapy twice a week for six weeks. The ALJ indicated that Plaintiff did not comply because she  
15 was going through a personal tragedy, and on October 22, 2012, and on May 9, 2013, she was  
16 noted as having no contact with the physical therapy facility. The ALJ also noted that Plaintiff  
17 was referred to pain management on two occasions. Plaintiff reported she fired the first referred  
18 specialist due to a disagreement with the plan of care, and she did not follow up with the second  
19 referral. The ALJ concluded that Plaintiff did not offer a sufficient explanation for not complying  
20 with the prescribed treatment. (AR 21.)

21 "A claimant's subjective symptom testimony may be undermined by an 'unexplained, or  
22 inadequately explained, failure to ... follow a prescribed course of treatment. While there are any  
23 number of good reasons for not doing so, a claimant's failure to assert one, or a finding by the

1 ALJ that the proffered reason is not believable, can cast doubt on the sincerity of the claimant's  
2 pain testimony.'" *Trevizo v. Berryhill*, 871 F.3d 664, 679-80 (9th Cir. 2017) (quoting *Fair v.*  
3 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

4       Regarding Plaintiff attending physical therapy, there is a notation that she was initially  
5 not able to come to physical therapy right after her surgery due to personal tragedy. Other  
6 records indicate that the personal tragedy was that her husband committed suicide, which would  
7 certainly qualify as a sufficient reason for not attending physical therapy at that time. (AR 427,  
8 378, 380, 460.) She subsequently attended physical therapy, though she did miss some sessions.  
9 (AR 329-323, 343-358.) She did report that the physical therapy caused her to have severe  
10 headaches, exacerbated her symptoms, and that she did not have a good experience. (AR 420,  
11 541.)

12       The ALJ did not take into account these explanations for not attending physical therapy.  
13 Therefore, this is not a clear and convincing reason supported by substantial evidence for  
14 discrediting Plaintiff's subjective symptom statements.

15       Regarding the referrals to the pain management specialists, the record does contain an  
16 explanation as to why Plaintiff stopped going to the first pain management specialist, Denis G.  
17 Patterson, DO. Dr. Patterson's treatment notes state that Plaintiff expressed she was unhappy  
18 with him and his staff. His records say that she demanded that Dr. Patterson start her on Percocet  
19 at eight times a day, and he told her that his policy would not allow him to do that because he did  
20 not think it was medically appropriate. She decided she wanted to pursue care elsewhere.  
21 (AR 364.) Plaintiff, on the other hand, reported to Dr. Olson's office that she thought  
22  
23



1 Dr. Patterson was arrogant and did not listen to her. (AR 424.) The ALJ did not discuss  
2 Plaintiff's explanation for terminating her care with Dr. Patterson other than to briefly mention  
3 that she fired him.

4 At an October 16, 2012 appointment, after describing the issues she had with  
5 Dr. Patterson, Dr. Olson referred her to Dr. Wesley or Dr. Berman for pain management.  
6 (AR 489.) Her other treating provider, Dr. Rafael, also referred her to Dr. Berman for evaluation  
7 of chronic pain on December 20, 2012. (AR 474.) There is a note from Dr. Rafael in September  
8 of 2015 that states Plaintiff reported she fired Dr. Berman, though there is no explanation  
9 provided, nor are there any treatment records from Dr. Berman. (AR 465.) Dr. Rafael gave her  
10 another referral to Dr. DeMourdaunt. (AR 465.) At that time, she had discontinued taking  
11 Percocet and Norco for pain. (AR 461.)

12 Dr. Rafael's note from March of 2016, states that Plaintiff had weaned herself off of  
13 hydrocodone, upon which she had been dependent for two years. Dr. Rafael explained that  
14 Plaintiff had seen physicians for treatment of chronic pain, but she declined to return due to her  
15 concern for treatment with oxycodone. (AR 461.)

16 The ALJ did not discuss Plaintiff's apparent firing of Dr. Berman, or her decision not to  
17 return to a pain management provider due to concerns over being treated with oxycodone, on  
18 which she had previously been dependent. In addition, Plaintiff did eventually return for chronic  
19 pain treatment at Sweetwater Pain and Spine.

20 The court finds the ALJ did not address Plaintiff's reasons for not continuing treatment  
21 with a pain management provider; therefore, this does not constitute a clear and convincing  
22 reason for rejecting Plaintiff's subjective symptom testimony.  
23

#### 4. Conclusion on Subjective Symptom Testimony

The Acting Commissioner argues that the ALJ found Plaintiff's allegations were "not entirely consistent" with the medical and other evidence, and so did not *completely* reject her testimony. The problem with that argument is the ALJ did not specify what portion of her testimony he was rejecting and what portion he was crediting.

In conclusion, the court finds the ALJ did not set forth specific, clear and convincing reasons for rejecting Plaintiff's subjective symptom testimony. Remand is appropriate for the ALJ to properly consider Plaintiff's subjective symptom testimony in assessing her RFC.

#### C. RFC

Plaintiff argues that the ALJ rejected all of the medical opinions, and as a result, there was no support from a medical source for the ALJ's conclusion that Plaintiff was capable of light work with specified off task, postural and manipulative limitations. Instead, Plaintiff contends the RFC assessment is nothing more than the ALJ's own lay medical opinion, and the ALJ did not explain how he arrived at Plaintiff's RFC.

The Acting Commissioner, on the other hand, argues that it is clearly the province of the ALJ to determine RFC.

The State medical reviewing consultants determined initially and on reconsideration that there was insufficient evidence for a functional analysis from the alleged onset date through the date last insured. (AR 110-111.) Dr. Roger Fast said that if her date last insured was not so far in the past, he would recommend trying to get a treater "MSS" (medical source statement), since her primary limitations are due to pain. He also determined that from an "objective standpoint she was capable of working," but at the same time said, "[a]t this point we have insufficient evidence." (AR 111.) The ALJ gave this opinion little weight. (AR 23.)

1 The ALJ also gave little weight to the opinions of Plaintiff's treating physicians,  
2 Dr. Olson and Dr. Rafael. (AR 24-25.)

3 The regulations provide that the ALJ must assess all the evidence, including  
4 the claimant's and others' descriptions of the limitations, and medical reports, to determine what  
5 capacity the claimant has for work despite his or her impairments. 20 C.F.R. § 404.1545(a)(3)  
6 and 416.945(a)(3). "[T]he ALJ is responsible for translating and incorporating clinical findings  
7 into a succinct RFC." *Rounds v. Comm'r of Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015)  
8 (citing *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008)).

9 While the ALJ is responsible for determining the RFC, the RFC must be supported by  
10 substantial evidence. "The ALJ must set out in the record his reasoning and the evidentiary  
11 support for his interpretation of the medical evidence." *Tackett v. Apfel*, 180 F.3d 1094, 1102  
12 (9th Cir. 1999) (citation omitted). Moreover, "the ALJ must use 'some medical evidence of the  
13 claimant's ability to function in the workplace' in order to make a proper RFC assessment; '[t]he  
14 ALJ may not simply draw his own inferences about [the claimant's] functional ability from  
15 medical reports.'" *Koch v. Kijakazi*, 4 F.4th 656, 667 (8th Cir. 2021) (quoting *Combs v.*  
16 *Berryhill*, 878 F.3d 642, 646 (8th Cir. 2017), and citing *Hutsell v. Massanari*, 259 F.3d 707, 712  
17 (8th Cir. 2001)); *see also* POMS § DI 24510.001(A)(1) ("The RFC assessment: is based  
18 primarily on medical evidence").

19 Courts have held that when al ALJ rejects the expert opinions in the record and instead  
20 relies on his own judgment in determining a claimant's RFC, the ALJ's decision is unsupported  
21 by substantial evidence. *See Rosado v. Sec'y of Health & Human Servs.*, 807 F.2d 292, 293 (1st  
22 Cir. 1986); *Jakubiak v. Berryhill*, 337 F.Supp.3d 80 (D. Mass. 2018); *Maniscalco v. Colvin*, 167  
23

1 F.Supp.3d 207, 217-18 (D. Mass. Mar. 3, 2016); *Beyene v. Astrue*, 739 F.Supp.2d 77, 83 (D.  
2 Mass. 2010).

3 Generally, a lay person is not qualified to interpret raw medical data to determine a  
4 claimant's RFC unless the impairments are so mild that they pose no significant functional  
5 limitations. *Manso-Pizarro v. Sec'y of Health & Human Servs.*, 76 F.3d 15, 17 (1st Cir. 1996);  
6 *Rosado*, 807 F.2d at 293-94; *Jakubiak*, 337 F.Supp.3d at 85 (citation omitted); *Maniscalco*, 167  
7 F.Supp.3d at 218-19; *Beyene*, 739 F.Supp.2d at 83 (citation omitted).

8 Here, the ALJ rejected all of the expert opinions in the record. The ALJ summarized the  
9 medical evidence regarding Plaintiff's carpal tunnel syndrome and cervical spine disorder and  
10 stated that it supported the RFC assessment, without providing any explanation for his  
11 determination that Plaintiff would be off task five percent of the time or regarding her postural  
12 and manipulative limitations. (AR 18, 21-23.) In rejecting all of the medical opinion evidence,  
13 the ALJ apparently relied only on the Plaintiff's medical records and possibly Plaintiff's own  
14 testimony in assessing the RFC. When the "medical findings in the record merely diagnose [the]  
15 claimant's exertional impairments and do not relate those diagnoses to specific residual  
16 functional capabilities...[the] bare medical findings are unintelligible to a lay person in terms of  
17 residual functional capacity." *Rosado*, 807 F.2d 293.

18 Plaintiff's impairments were not so mild that they did not pose any significant functional  
19 limitations, and it was improper for the ALJ to draw his own conclusions regarding Plaintiff's  
20 RFC without the support of an expert medical assessment. Therefore, the ALJ's RFC assessment  
21 is unsupported by substantial evidence, and this must be remanded to obtain further functional  
22 evidence.

1 **D. Remand**

2 This matter will be remanded for further administrative proceedings to consider  
3 Plaintiff's subjective symptom testimony and further develop the record to determine Plaintiff's  
4 RFC.

5 **IV. CONCLUSION**

6 Plaintiff's motion for reversal and/or remand (ECF No. 17) is **GRANTED**;

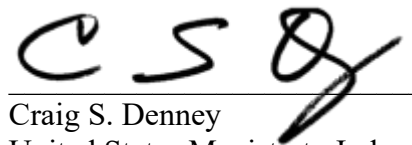
7 The Acting Commissioner's cross-motion (ECF No. 18) is **DENIED**;

8 This matter is **REMANDED** for further proceedings consistent with this Order; and

9 The Clerk shall enter **JUDGMENT** accordingly.

10 **IT IS HEREBY ORDERED.**

11 Dated: February 14, 2022

12   
13 Craig S. Denney  
14 United States Magistrate Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23